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No. 82-6614

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ASTRID GALINDO SARDOZ and MARIA SOTO VDA. DE TALAMANTES as co-personal representatives of the Estate of BERNARDO TALAMANTES, a/k/a HECTOR M. BAYLON, deceased,

Appellants,

vs.

KENT NOWLIN CONSTRUCTION COMPANY,

Appellee.

JUN 16 PAGE 7

APPELLANTS' BRIEF IN OPPOSITION TO THE MOTION TO DISMISS OR AFFIRM

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Pursuant to Sup. Ct. R. 16.5, Appellants respectfully submit this response to the Motion to Dismiss or Affirm filed by Appellee.

POINT I

THE CONSTITUTIONAL QUESTIONS RAISED IN THE JURISDICTIONAL STATEMENT WERE PRESERVED FOR APPEAL.

Contrary to the suggestion made by appellee, each of the constitutional questions raised in the Jurisdictional Statement was squarely presented to the New Mexico Supreme Court. Indeed, the rehearing in the Court below focussed substantially on the constitutional questions which are now being presented for review. In fact, upon the initial granting of the rehearing, the New Mexico Supreme Court accepted supplemental briefs on the constitutional questions from both sides. On October 25, 1982, appellants herein filed their Supplemental

'Brief in the court below (Attached hereto as Appendix A) which in Point II directly raised each of the constitutional issues covered in the Jurisdictional Statement. Moreover, appellee responded in a Supplemental Brief, filed on November 4, 1982. Attached hereto as Appendix B. In its response appellee also dealt with each of the constitutional claims presented in the Jurisdictional Statement. Thus, these claims were made explicit in the state court, were passed on by the court,[1] and were thereby properly preserved for presentation to this Court on appeal. See R. Stern & E. Gressman, Supreme Court Practice 163 (5th ed 1978).

Appellee urges that "Insofar as the appeal centers on the exclusion provision in the New Mexico Workmen's Compensation Act, it should be dismissed, since that claim was abandoned voluntarily by the appellants before this matter ever came on to trial." Motion to Dismiss or Affirm at 12. This proposition is wrong for two reasons. First, the substantial constitutional questions raised in the Jurisdictional Statement are not based on challenges to either the exclusion provision or the exclusive remedy provision in isolation, but rather, as the very portion of the Jurisdictional Statement cited by appellee indicates, see Motion to Dismiss or Affirm at 7, appellants challenge the exclusive remedy provision as construed by the state supreme court below as it operates in tandem with Section 52-1-52 of the Workmen's Compensation Act (the exclusion provision).

Second, there is a cruel irony in this argument for dismissal. Its essential contention is that Mrs. Talamantes and her children should, for procedural reasons, be deprived of a

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[1]The ruling of January 14, 1983 withdrawing the prior grant of a reharing, from which this appeal follows, was a decision sustaining the constitutional validity of the tandem operation of the two challenged state statutes.

hearing on their substantial constitutional claims because, after unsuccessfully joining the challenge to the exclusion provision in Pedrazza, they followed the express guidance of the state supreme court in that opinion and pursued their "other avenues of recovery." Pedrazza v. Sid Fleming Contractor, Inc., 94 N.M. 59, 63, 607 P.2d 597, 599 (1980). Such an argument merely serves to highlight the gross inequity inflicted on Mrs. Talamantes.

POINT II.

THE QUESTIONS PRESENTED IN THE JURISDICTIONAL STATEMENT ARE SUBSTANTIAL.

Appellants' essential constitutional claims, based in due process, equal protection, and interference with federal control over immigration policy, discussed in detail in the Jurisdictional Statement, are substantial and merit plenary review in this Court.[2] Appellee's arguments to the contrary are grounded in an attempt to characterize these claims as directed to the exclusive remedy provision and the exclusion provision independently and in isolation from each other. Having created this "strawman," appellee seeks to defend the constitutionality of each provision independently. This line of argumentation entirely misses the point of the Jurisdictional Statement -- appellants' substantial constitutional

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[2]Appellants hereby abandon the treaty argument set forth in Point IV, A of the Jurisdictional Statement because additional research establishes that it is not well founded.

As noted in the Jurisdictional Statement, the 1831 Treaty of Amity, Commerce, and Navigation between the United States of America and the United Mexican States, 8 Stat. 410 was incorporated into the Treaty of Guadalupe Hidalgo, 9 Stat. 922, art. XVII (1848). Appellants' counsel have just discovered, however, that consistent with the provisions of the 1848 Treaty, the Treaty of Amity, Commerce, and Navagation was terminated by Mexico effective November 30, 1881. C. Bevans, Treaties and Other International Agreements of the United States of America, 1776-1949, at 764. As a result, the provisions of the 1831 treaty cannot support a supremacy clause claim. All other questions raised in the Jurisdictional Statement are substantial, remain at issue, and merit plenary consideration.

claims arise from the tandem operation of the two provisions which denies Mrs. Talamantes and her children any claim, remedy or compensation for the death of their husband and father.

CONCLUSION

Because the constitutional questions presented in the Jurisdictional Statement are substantial and were properly preserved for appeal, appellants respectfully request that the Court deny the motion, note probable jurisdiction, and set this case for plenary consideration, including briefs on the merits and oral argument in support thereof.

Respectfully submitted,

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IN THE SUPREME COURT OF THE

STATE OF NEW MEXICO

KENT NOWLIN CONSTRUCTION COMPANY,

Defendant-Petitioner,

vs.

No. 13,914

ESTELA E. GUTIERREZ and MARIA SOTA VDA DE TALAMANTES, as co-personal representatives of the ESTATE OF BERNARDO TALAMANTES, a/k/a HECTOR M. BAYLON, Deceased,

Plaintiffs-Respondents.

Original Proceeding on Certiorari

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APPENDIX A

IN THE SUPREME COURT OF THE

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INTRODUCTION

On September 30, 1982, the decision in this case was filed. The majority opinion reversed a unanimous decision of the court of appeals holding that the "exclusive remedy" provision of the workers' compensation act did not bar nonresident alien survivors who have no benefits under the act from pursuing a wrongful death action against the employer whose negligence had caused the death of the plaintiffs' decedent. Two justices dissented from the majority opinion. On October 14, 1982, plaintiffs-respondents filed a motion for rehearing. On October 15, 1982, this Court entered an order granting rehearing and calling for the parties to file briefs addressing the merits of the issues raised in the motion for rehearing.

Plaintiffs-respondents file this Supplemental Brief in support of their position that the majority opinion in this case reached an erroneous construction of the "exclusive remedy" provision of the workers' compensation statute to bar plaintiffs from any remedy whatsoever for the negligent death of their husband and father; that in reaching this harsh result, the majority opinion erroneously disregarded the explicit and opposite construction of the "exclusive remedy" provision in Pedrazza v. Sid Fleming Contractor, Inc., 94 N.M. 59, 607 P.2d 597 (1980); and that the majority opinion's construction of the workers' compensation act renders the act unconstitutional, in violation of the supremacy clause, the due process clause, and equal protection clause.

This Supplemental Brief does not recapitulate the arguments contained in Plaintiffs-Respondents' Answer Brief in the court of appeals and their Brief in Support of Their Motion for Rehearing filed in this Court. Plaintiffs-respondents respectfully refer this Court to those briefs, which

also address the merits of the matters raised in plaintiffs-respondents' motion for rehearing.

I.

THE CONSTRUCTION OF THE "EXCLUSIVE REMEDY" PROVISION OF THE WORKERS' COMPENSATION ACT IN PEDRAZZA V. SID FLEMING CONTRACTOR, INC., IS CONTROLLING. THE MAJORITY OPINION ERRONEOUSLY DISREGARDED PEDRAZZA TO REACH AN INCORRECT CONSTRUCTION OF THAT PROVISION.

The only question addressed by the majority opinion in this cause is whether the "exclusive remedy" provision[1] of the workers' compensation statute, N.M. Stat. Ann. § 52-1-9 (1978), operates to bar plaintiffs' Wrongful Death Act claim, notwithstanding the fact that plaintiffs, as nonresident alien survivors of the decedent, are barred from receiving survivors' benefits under the compensation act. Just two years ago, in Pedrazza v. Sid Fleming Contractor, Inc., 94 N.M. 59, 607 P.2d 597 (1980), this Court addressed that same question in virtually identical circumstances. In Pedrazza, this Court held that while section 52-1-52, barring survivors' benefits to nonresident alien dependents, was not unconstitutional under the fourteenth amendment, 94 N.M. at 62, 607 P.2d at 600, the "exclusive remedy" provision of the compensation act would have no application to such nonresident

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[1]The "exclusive remedy" provision of the workers' compensation act is found in N.M. Stat. Ann. § 52-1-9 (1978), which provides as follows:

> The right to the compensation provided for in this act [52-1-1 to 52-1-69 NMSA 1978], in lieu of any other liability whatsoever, to any and all persons whomsoever, for any personal injury accidentally sustained or death resulting therefrom, shall obtain in all cases where the following conditions occur:
>
> A. at the time of the accident, the employer has complied with the provisions thereof regarding insurance;
>
> B. at the time of the accident, the employee is performing service arising out of and in the course of his employment; and
>
> C. the injury or death is proximately caused by accident arising out of and in the course of his employment and is not intentionally self-inflicted.

alien survivors and therefore would not bar "other avenues of recovery." 94 N.M. at 63, 607 P.2d at 601.

The Pedrazza court's construction of the "exclusive remedy" provision of the compensation act was clear, considered, and explicit. First, the Court made explicit reference to the exclusive remedy provision and held that it would not apply to nonresident alien survivors, not covered under the act:

> It is important to note the exclusive nature and operation of workmen's compensation. If an employer and employee are covered by the Act, all their rights and remedies are defined exclusively by the Act. § 52-1-9, N.M.S.A. 1978. As between the employer and the employee, all other common law and statutory actions are barred by the Act. This bar also applies to the employee's dependents to the extent that they are covered by the Act.

94 N.M. at 61, 607 P.2d at 599 (emphasis added). The Court then went on to recognize explicitly that this construction of the "exclusive remedy" provision would not bar claims like plaintiffs' in this case:

> This opinion does not deny plaintiffs other avenues of recovery. The worker and his dependents are independent of and take separately from one another under the Act. Therefore, the bar against using other legal remedies to recover for the injury or death of a worker cannot be raised against those dependents not covered by the Act.

94 N.M. at 63, 607 P.2d at 601 (emphasis added).

This Court's language in Pedrazza could not have been clearer or more explicit. Moreover, there is no doubt that this construction of the "exclusive remedy" provision was conscious and considered. This conclusion is reinforced by the fact that not only did the Pedrazza court construe the "exclusive remedy" provision of the compensation act as not applying to nonresident alien survivors, who are not covered by the Act, but the Court then went on to recognize explicitly that the application of that construction would allow for the prosecution of other legal remedies "to recover for

the injury or death of a worker." 94 N.M. at 63, 607 P.2d at 601. Finally, the Pedrazza court was fully cognizant of the impact of its construction of the "exclusive remedy" provision on situations like that presented in this case. First, the circumstances in Pedrazza were virtually identical to the circumstances in this case. Second, both plaintiffs and defendant in this case participated in Pedrazza as amicus curiae, thereby making the Pedrazza court aware of the pendency of this lawsuit.

The majority opinion in the present case reached the opposite construction of the "exclusive remedy" provision and held that plaintiffs are barred from prosecuting their wrongful death action and thereby have no remedy whatsoever in New Mexico courts for the negligent death of their husband and father. In reaching this manifestly harsh result, the majority opinion disregarded as dictum the considered construction of the same provision in Pedrazza. The majority opinion, however, failed to analyze the Pedrazza opinion or otherwise explicate its conclusion that the clear and explicit construction of the "exclusive remedy" provision in Pedrazza was dictum. Contrary to the majority opinion's characterization, the Pedrazza court's construction was not obiter dictum and was therefore dispositive of the question decided by the majority opinion in this case. The Pedrazza construction of the "exclusive remedy" provision is controlling because it formed an essential and integral part of the reasoning of the Court in reaching its conclusion and because it was an explicit and considered construction of the statutory scheme at issue in both that decision and the present case.

The binding effect of a precedential decision extends not only to the narrow holding of the decision, but also to the ratio decidendi; that is, the reasoning which is essential to that holding. See, e.g., Beamish v. Beamish, 9

H.C.L. 274, 338-39 (1861) ("The law laid down as your ratio decidendi [is] clearly binding ...."); K. Lewellyn, The Bramble Bush 156-60 (2d ed. 1951) ("[T]he rule follows where its reason leads ...."). The determination in Pedrazza that the "exclusive remedy" provision of the compensation act did not apply to nonresident alien survivors not covered by the act was an essential and integral part of the reasoning of the Court, necessary to its holding and therefore is binding in this case.

In Pedrazza, the plaintiffs challenged as unconstitutional section 52-1-52, N.M. Stat. Ann. (1978), which bars workers' compensation survivors' benefits to nonresident aliens. In reaching its holding that section 52-1-52 did not violate either the due process or equal protection clauses, the Pedrazza court was required to rely on its construction of the "exclusive remedy" provision as not barring nonresident alien survivors.

A critical part of the Pedrazza court's reasoning in determining that section 52-1-52 was not violative of the due process clause was the Court's determination of what interests were being denied to the plaintiffs. The Court predicated its holding that there was no denial of due process on its conclusion that no "fundamental right" was involved. 94 N.M. at 61, 607 P.2d at 599. The Court concluded that because the "exclusive remedy" provision of the compensation act did not bar nonresident aliens from pursuing other remedies, all that was being denied to plaintiffs under the act were their survivors' benefits. The Court held that workers' compensation survivors' benefits did not rise to the level of a "fundamental right" and therefore no due process violation arose from this denial to the plaintiffs.

This construction of the "exclusive remedy" provision of the compensation act is not only essential to, but is the

"linchpin" of, the Pedrazza court's holding of no due process violation. If the Pedrazza court's construction of the "exclusive remedy" provision had been otherwise, the due process issue would have been decided in an entirely different context. To say that depriving an employee's surviving dependents only of workers' compensation benefits is one thing; to say that the survivors are deprived of all remedies is quite another thing. Not only would the issue have changed, but, as argued in point II infra, the result would also have changed. There can be no doubt that the Pedrazza court's construction of the "exclusive remedy" provision formed a vital predicate to the Court's due process holding.

The federal district court in Cole v. University of Hartford, 391 F. Supp. 888 (D. Conn. 1975), employing a similar analysis, construed precedential language as controlling and not obiter dictum. In Cole, the issue was whether the plaintiff, who had brought a civil rights action against the defendant, was required to exhaust remedies before the Equal Employment Opportunity Commission. The plaintiff relied on explicit language from a Second Circuit decision stating that exhaustion was not required. The defendant urged the district court to disregard the precedential language as dictum, since the narrow holding of the precedent went only to affirming the denial of a preliminary injunction. The district court held that the language addressing exhaustion was not dictum because the exhaustion issue was a necessary predicate to finding jurisdiction: "It was necessary for the circuit court to find that exhaustion was not required in order to determine that the federal courts properly had jurisdiction of the case ...." 391 F. Supp. at 890 n.3. Similarly, the Pedrazza court's construction of the "exclusive remedy" provision was not dictum, because it was necessary to the holding that there was no due process violation.

The construction of the "exclusive remedy" provision was equally critical to the Pedrazza court's holding that section 52-1-52 did not violate the equal protection clause. The Pedrazza court explicitly identified section 52-1-52 as "hostile legislation," subjecting nonresident aliens to discriminatory treatment. 94 N.M. at 62, 607 P.2d at 600. The Court held that there was no violation of the equal protection clause on the basis that the Pedrazza plaintiffs, all nonresidents of the United States, could not claim the protection of the equal protection clause. Essential to that holding was the conclusion that under the workers' compensation scheme, the interests and rights of survivors are independent of, and not derivative of, the interests and rights of the worker who is killed in the course of his employment and who is a resident of the United States. In making this determination, the Court looked to the statute as a whole, including the "exclusive remedy" provision. The Court pointed to the "exclusive remedy" provision as one manifestation in the legislative scheme that the statutory rights and interests of survivors are independent of those of the worker, declaring that since their interests are independent, noncovered survivors would not be barred from other remedies by the "exclusive remedy" provision.

The essential nature of that construction to the Pedrazza court's equal protection holding is made clear if a contrary construction is considered. If the Court had construed the "exclusive remedy" provision to be applicable to noncovered survivors, thereby barring them from other remedies, the effect would have been that the workers' compensation statute, as a whole, would have discriminated against nonresident alien survivors by denying to them any remedy and compensation for the negligent death of the worker, while resident survivors would have been eligible for survivors'

benefits under the compensation act. The rights and interests thereby implicated would have included not only the interests in survivors' benefits, which may be independent of the interests of the worker, but also would have implicated the interests of the survivors in a wrongful death action. As argued in point II infra, survivors' interests in a wrongful death action are clearly derivative of the interests of the decedent. As such, the discrimination effected by the statutory scheme would have implicated interests of the resident worker, which his survivors would have standing to raise. Under these circumstances, the Pedrazza plaintiffs could properly raise the violation of the equal protection clause worked against their husband and father.

An analysis of the Pedrazza decision establishes that contrary to the characterization of the majority opinion in the present case, the construction of the "exclusive remedy" provision was not dictum but rather was an integral and essential link in the reasoning of the Court in reaching its holdings. The construction was explicit, repeated, and considered. The United States Supreme Court has recognized that where a prior decision reflects a considered and explicit decision, that decision cannot be considered dictum. See Union Pacific Co. v. Mason City Co., 199 U.S. 160, 166 (1905) ("Whenever a question fairly arises in the course of [an appeal], and there is a distinct decision of that question, the ruling of the court in respect thereto can, in no just sense, be called mere dictum.").

In addressing the constitutional claims raised, the Pedrazza court was faithful to its obligation to construe the statute as a whole. State ex rel. Bird v. Apodaca, 91 N.M. 279, 284, 573 P.2d 213, 218 (1977). This obligation required the Court to construe the "exclusive remedy" provision. The explicit and considered construction of the "exclusive rem-

edy" provision therefore cannot be considered dictum. See Bellar v. National Motor Fleets, Inc., 450 S.W.2d 312, 314 (Tenn. 1970) ("On principle and reason it might very well be postulated that a case construing the particular words of a statute could hardly ever be dictum in a later case involving the same statut[ory] language.").

Even if the Pedrazza court's construction of the "exclusive remedy" provision were considered dictum, the majority opinion in the present case still erroneously disregarded that construction. The majority opinion fails to recognize the distinction between judicial dictum and obiter dictum. Where a judicial decision is germane to the controversy and deliberately passed on by the court, even if not essential to the holding of the court, that decision is judicial dictum and is accorded controlling effect as stare decisis. See, e.g., Beloit Corp. v. Department of Industry, Labor & Human Relations, 63 Wis. 2d 23, __, 216 N.W.2d 233, 238 (1974) ("[T]he discussion of sec. 269.34 was certainly germane to the issue even if not decisive and is therefore not dictum."); Chase v. American Cartage Co., 186 N.W. 598, 599 (Wis. 1922) ("[W]hen a court of last resort intentionally takes up, discusses and decides a question germane to, though not necessarily decisive of, the controversy, such decision is not a dictum, but is a judicial act of the court which it will thereafter recognize as a binding decision."); Crescent Ring Co. v. Travelers' Indemnity Co., 132 A. 106, 107-08 (N.J. Ct. App. 1926) ("There is a decided difference between the two kinds. Obiter dictum is an expression of opinion by the court or judge on a collateral question not directly involved, or mere argument or illustration originating with him, while judicial dictum is an expression of opinion on a question directly involved, argued by counsel and deliber-

ately passed on by the court, though not necessary for a decision.").

The Pedrazza court's construction of the "exclusive remedy" provision must be considered controlling and therefore dispositive of the issue presented in the present case because, even as judicial dictum, it was germane to the decision and reflected the deliberate and considered judgment of the Court. Moreover, Pedrazza was decided less than two years ago, see Cole v. University of Hartford, 391 F. Supp. 888, 890 n.3 (D. Conn. 1975) ("Even if it were dicta, however, this court would be extremely reluctant to depart from an obviously carefully considered conclusion of the Second Circuit that is barely six months old ...."), and arose in a factual setting virtually identical to that presented in this case. See Perfection Tire & Rubber Co. v. Kellogg-Mackay Equipment Co., 187 N.W. 32, 35 (Iowa 1922) ("The binding force of a decision is coextensive with the facts upon which it is founded, and if correlated subject matter is under discussion and decided, such decision is not mere obiter dictum. It is at least a judicial dictum.").

Finally, the Pedrazza court's construction of the "exclusive remedy" provision as not barring nonresident, alien survivors from pursuing other remedies should be followed because that construction is manifestly correct, consonant with the underlying purpose and scheme of the compensation act and avoiding grave constitutional problems which a contrary construction would raise. The sole basis for the majority opinion's holding in the present case that the "exclusive remedy" provision barred plaintiffs from their wrongful death action was that the provision had a "plain meaning" to bar nonresident alien survivors of any remedy and any compensation whatsoever. In construing the statute, however,

the majority opinion fails to analyze the language of the statute, its underlying purpose, or any relevant case law.

Contrary to the majority opinion's characterization, New Mexico case law construing the workers' compensation statute has not found the "exclusive remedy" provision to have a plain meaning or to be all inclusive. In City of Artesia v. Carter, 94 N.M. 311, 610 P.2d 198 (Ct. App.), cert. denied, 94 N.M. 628, 614 P.2d 545 (1980), the court of appeals recently held that the "exclusive remedy" provision of the compensation act neither had a "plain meaning" nor was "all inclusive."[2] In Carter, the court of appeals narrowly construed the language of the "exclusive remedy" provision of the act and held that an action against an employer based on an express contract of indemnity was not barred. There are substantial differences between the claims raised in City of Artesia and those raised in the present case, and plaintiffs do not argue that the holding or reasoning of City of Artesia compels the conclusion urged by plaintiffs here. Rather, the key point of the City of Artesia decision is that it reflects that the language of the "exclusive remedy" provision of the workers' compensation statute is not "all inclusive" and is capable of a narrow construction, allowing for the retention of certain claims against an employer.

Other courts, construing similar statutory provisions in workers' compensation acts, have also found the "exclusive remedy" provision not to have plain meanings or to be all inclusive. See, e.g., Travelers Insurance Co. v. Panama-Williams, Inc., 597 F.2d 702 (10th Cir. 1979); Ransmeier v.

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[2] Carter expressly overruled Gulf Oil Corp. v. Rota-Cone Field Operating Co., 84 N.M. 483, 505 P.2d 78 (Ct. App. 1972). Rota-Cone, employing a "plain meaning" analysis, held that the "exclusive remedy" provision of the act barred actions against the employer based on express contracts of indemnity, reasoning that the language of the "exclusive remedy" provision was "all inclusive," 84 N.M. at 484, 505 P.2d at 79, and therefore barred all claims whatsoever.

Camp Cody, Inc., 378 A.2d 752 (N.H. 1977). Indeed, in Ransmeier, the New Hampshire Supreme Court accorded to its workers' compensation statute a narrow construction, holding that the "exclusive remedy" provision of that statute did not bar a wrongful death action against the employer brought by surviving dependents not covered by the act. 378 A.2d at 753-54.

These cases establish that the "exclusive remedy" provision does not have a plain meaning, is not all inclusive, and is susceptible of a narrow construction. The question therefore becomes whether the Pedrazza court's narrow construction of this provision was correct. Plaintiffs submit that the Pedrazza decision was correct because the narrow construction of the "exclusive remedy" provision of the workers' compensation act is fully consonant with the language, structure, and policies of the act. It is generally recognized that "exclusive remedy" provisions in workers' compensation acts, like New Mexico's, reflect a legislative "tradeoff" of interests. By the compensation system created in the statutory scheme, the legislature created a new, certain, and expedient remedy for employees and imposed it on employers. In consideration for this imposition of new liability on employers, the legislature then gave something to the employer: relief from other types of liabilities for which the new remedy had been substituted. The majority opinion recognizes this analysis.

Larson, the leading authority in the area, describes this "quid pro quo" analysis and how it bears on the proper construction of "exclusive remedy" provision:

> Once a workmen's compensation act has become applicable either through compulsion or election, it affords the exclusive remedy for the injury by the employee or his dependents against the employer and insurance carrier. This is part of the quid pro quo in which the sacrifices and gains of employees and employers are to some extent put in balance, for, while the employer assumes a new lia-

> bility without fault, he is relieved of the prospect of large damage verdicts.
>
> If this is the justification for the exclusive remedy rule, it ought logically to follow that the employer should be spared damage liability only when compensation liability has actually been provided in its place, or, to state the matter from the employee's point of view, rights of action for damages should not be deemed taken away except when something of value has been put in their place.

2(A) A. Larson, The Law of Workmen's Compensation § 65.10, at 12-1 to 12-4 (1982). The language of the "exclusive remedy" provision of the act further supports the "quid pro quo" analysis. Thus, section 52-1-9, N.M. Stat. Ann. (1978), states that the "right to the compensation provided for in this Act [is] in lieu of any other liability." Certainly this language admits of the construction that if there is no "compensation provided in this Act," the remainder of the section will not apply.

The Pedrazza court's narrow construction of the "exclusive remedy" provision is fully supported by this "quid pro quo" analysis of the act. The act gave to beneficiaries of the act an easy and definite compensation (the "quid") in exchange for the beneficiaries' giving up of the more speculative but potentially more rewarding common law and other statutory claims (the "quo"). Under this analysis, it makes little sense to construe the legislative purpose as requiring persons who receive no "quid" to give up their "quo." The Pedrazza court engaged in just this reasoning in concluding that nonresident alien dependents were not barred from bringing wrongful death actions against an employer. Since the act clearly and explicitly precludes the nonresident alien dependents from benefits, the Court could not construe the legislation as requiring these nonresident aliens to relinquish their other claims, having received nothing in return.

In contrast, the construction accorded to the "exclusive remedy" provision by the majority opinion in the present case

attributes to the legislature an intent to encourage employers to hire aliens to the detriment of job opportunities for New Mexico citizens. The message to employers from the majority opinion is clear: It is advantageous to employ aliens whose survivors are nonresidents, because in such situations the employer will be completely insulated from liability in the event the employee is killed in a work-related accident. Not only should this Court not send such a message to New Mexico employers, it certainly should not infer that the legislature compels such a message.

The narrow construction given to the "exclusive remedy" provision by the Pedrazza court is also warranted because such a narrow construction avoids the grave constitutional problems a contrary construction would create. See point II infra. The Pedrazza court's construction was fully consonant with this Court's obligation to construe the statute to avoid constitutional difficulties. See New Mexico State Board of Education v. Board of Education, 95 N.M. 588, 624 P.2d 530 (1981).

The majority opinion's construction of the "exclusive remedy" provision to bar plaintiffs from any redress whatsoever for the negligent death of their husband and father is manifestly harsh and unnecessary. In reaching this harsh result, the majority opinion erroneously disregards as dictum the contrary construction of the statute in Pedrazza. The Pedrazza construction of the statute is not dictum but rather is an explicit, considered, and essential predicate to the Court's holdings. As such, Pedrazza is correct, controlling, and is dispositive of the present case.

II.

THE CONSTRUCTION OF THE "EXCLUSIVE REMEDY" PROVISION BY THE MAJORITY OPINION RENDERS THE WORKERS' COMPENSATION ACT UNCONSTITUTIONAL, IN VIOLATION OF THE SUPREMACY CLAUSE, ART. VI, CL. 2, AND THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT.

The majority opinion construes the "exclusive remedy" provision of the workers' compensation act as barring plaintiffs from pursuing their wrongful death action. The necessary effect of the majority opinion, read together with the Pedrazza opinion, is to construe the compensation act as depriving nonresident alien survivors of any remedy or compensation whatsoever for the negligent death of their husbands, fathers, and providers. This construction of the "exclusive remedy" provision and the compensation act contravenes the United States Constitution in three independent ways. First, the majority opinion's construction contravenes the supremacy clause, U.S. Const. art. VI, cl. 2, in that it construes New Mexico law to be inconsistent with treaty obligations between the United States and Mexico and because it trenches upon the exclusive and plenary power of Congress to regulate immigration to this country, U.S. Const. art. I, § 8, cl. 4. Second, the majority opinion's construction of the statute deprives Mr. Talamantes, plaintiffs' decedent, and plaintiffs of due process, by completely denying any right, remedy, or compensation for the negligent death of Mr. Talamantes. Third, the plainly discriminatory treatment of affording some compensation to U.S. citizens for the work-related death of a breadwinner, but denying any compensation to nonresident alien survivors, contravenes the equal protection clause of the fourteenth amendment.

The Supremacy Clause. The supremacy clause of the United States Constitution provides as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2. The supremacy clause has been construed to come into play and preempt any state statute

which is inconsistent with an explicit or implicit federal treaty obligation.

In Kolovrat v. Oregon, 366 U.S. 187 (1961), the Supreme Court struck down under the supremacy clause a state statute prohibiting nonresident aliens from inheriting property, as conflicting with federal treaty obligations: "[S]tate policies as to the rights of aliens to inherit must give way under our Constitution's Supremacy Clause to 'overriding' federal treaties and conflicting arrangements ...." 366 U.S. at 190. In reaching its holding, the Court rejected a narrow and technical construction by the state court of a treaty between the United States and Yugoslavia, stating that the treaty must be construed liberally to give effect to the purpose of the treaty to ensure free traffic and commerce among the signatory nations. 366 U.S. at 192-93, 194.

The majority opinion's construction of the "exclusive remedy" provision of the workers' compensation statute as barring any compensation and remedy whatsoever to nonresident alien survivors of the worker contravenes solemn treaty obligations between the United States and Mexico. The 1831 Treaty of Amity, Commerce, and Navigation Between the United States of America and the United Mexican States,[3] 8 Stat. 410, clearly establishes that Mexican nationals within the United States of American are to have the same protections of their persons and property as are afforded to United States citizens. Article XIV of the treaty provides:

> Both the contracting parties promise and engage to give their special protection to the persons and property of the citizens of each other, of all occupations, who may be in their territories, subject to the jurisdiction of the one or of the other, transient or dwelling therein ....

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[3]The treaty must be construed liberally to give effect to its stated purpose to establish "most favored nation status" to the signatories, art. III, and to promote free and secure commerce and intercourse between the citizens of the United States of America and the United Mexican States. Art. IV.

(emphasis added). The same article goes on to provide that this "special protection" shall be executed by providing to Mexican nationals "open and free" access to the courts, on equal terms as are afforded to citizens of the United States. The article finally provides:[4]

> [T]he citizens of either party, or their agents, shall enjoy, in every respect, the same rights and privileges, either in prosecuting or defending their rights of person or of property, as the citizens of the country where the cause may be tried.

The majority opinion's construction of the "exclusive remedy" provision and the workers' compensation act conflicts with the explicit and implicit requirements of the 1831 treaty in several ways. First, in construing the statute to completely insulate a negligent employer who causes the death of a Mexican national working in the United States, it can hardly be said that "special protection to the person" of the Mexican national is being afforded. Moreover, in denying to the survivors of the decedent any right to compensation whatsoever, either through survivors' benefits or wrongful death action, the majority opinion construes the compensation act in such a way as to specifically deny to Mexican nationals the same "rights and privileges, either in prosecuting or defending their rights of person or of property,"[5] as United

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[4]It should be noted that while all the other clauses of article XIV of the treaty limit the rights conferred therein to Mexicans within the territorial confines of the United States, this last clause has no such limitation and applies, by its terms, to all Mexican citizens, whether resident or nonresident in the United States.

[5]These "rights and privileges" are further explicated when other treaty obligations and arrangements are referred to. Thus, when the United States and Mexico enter into treaties dealing specifically with certain labor programs, these treaties explicitly provide that "workers admitted under this agreement shall enjoy as regards occupational diseases and accidents the same guarantees enjoyed by domestic workers engaged in similar work under Federal or State legislation in the United States." 1943 Agreement Between the United States of America and Mexico Respecting Recruiting of Mexican Non-Agricultural Workers, art. III(B)(7), 57 Stat. 1356; see also Migrant Labor Agreement of 1951, "Occupational Risks," 2 UST 1987. Moreover, article IX, section 2, of the Convention between the United States and Mexico respecting the duties of consular officers specifically identifies as one of the duties of the consul to collect and receive "on behalf of his non-resident countrymen

States citizens are afforded. The "exclusive remedy" provision of the workers' compensation statute, as construed by the majority opinion, is in conflict with controlling federal treaties and therefore is violative of the supremacy clause.

Even if the majority opinion's construction of the "exclusive remedy" provision did not conflict with specific treaty obligations, it would still violate the supremacy clause, in that the statute, as construed, interferes with the federal government's exclusive and plenary control over immigration policy. The Constitution of the United States of America vests exclusive and plenary authority in the federal government to regulate immigration into the United States. U.S. Const. art. I, § 8, cl. 4; see Takahashi v. Fish & Game Commission, 334 U.S. 410, 419 (1948) (Federal government has "broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms of conditions of their naturalization."). The United States Supreme Court and lower federal courts have held consistently that where a state statutory scheme imposes discriminatory burdens on aliens, such a scheme encroaches on the federal governments power to regulate immigration and therefore is preempted under the supremacy clause. See, e.g., Graham v. Richardson, 403 U.S. 365 (1971); Moreno v. Toll, 489 F. Supp. 658 (D. Md. 1980).

In Graham v. Richardson, the Supreme Court addressed the constitutionality of an Arizona regulatory scheme which de-

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... [benefits] accruing under provisions of so-called Workmen's Compensation Laws or other like statutes." 57 Stat. 800. An analysis of the entire range of treaties and arrangements between the United States and Mexico establishes that it is the intention of the signatory countries that nonresident Mexican nationals would not be deprived of all remedies or compensation for the death of a Mexican worker in the United States, as the majority opinion holds. Rather, these solemn treaty obligations clearly contemplate that nonresident Mexican survivors would be entitled to compensation and would have the ability to pursue their right to compensation through judicial remedy.

nied certain welfare benefits to indigent aliens residing in Arizona. The Court held that the Arizona scheme imposed discriminatory treatment on aliens, requiring a five-year residency period for alien eligibility for benefits, where no such durational eligibility requirement existed for United States citizens. The Court held that this discriminatory treatment trenched on Congress' exclusive power to regulate immigration and therefore violated the supremacy clause: "State laws that restrict the eligibility of aliens for welfare benefits merely because of their alienage conflict with these overriding national policies in an area constitutionally entrusted to the Federal Government." 403 U.S. at 378. Similarly, in Moreno v. Toll, the district court held that a policy of the University of Maryland which precluded nonimmigrant aliens from consideration as in-state students for tuition purposes imposed a discriminatory burden on the aliens. The Court held that this discriminatory burden violated the supremacy clause in that it encroached on Congress' power to regulate immigration. 489 F. Supp. at 668.

The majority opinion's construction of the "exclusive remedy" provision of the compensation act creates just the type of discriminatory burden invalidated in Graham and Moreno. Like the regulatory schemes in Graham and Moreno, the construction of the "exclusive remedy" provision is discriminatory. While resident survivors are afforded some benefits and remedies for the death of the decedent, nonresident aliens are denied all benefits and remedies. Like Graham and Moreno, the discriminatory treatment is based on alienage.[6] Finally, like the schemes in Graham and Moreno, the depriva-

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[6]While section 52-1-52 appears neutral on its face, this Court in Pedrazza explicitly identified the bar to survivors' benefits as "hostile" legislation, 92 N.M. at 62, 607 P.2d at 600. Moreover, this Court, nearly fifty years ago, identified section 52-1-52 as directed at alien workers. Gallup American Coal Co. v. Lira, 39 N.M. 496, 501, 50 P.2d 430, 435 (1935).

tion of any compensation or remedy to alien workers and their survivors imposes a burden on the immigration of alien workers to New Mexico. Graham and Moreno establish that the total and discriminatory deprivation of all compensation and remedy to nonresident alien survivors is violative of the supremacy clause.

Due Process. In Pedrazza, the Court held that section 52-1-52 did not violate the due process clause of the fourteenth amendment, because all that the Pedrazza plaintiffs were deprived of was their survivors' benefits under the compensation act. The Court held that this deprivation was not sufficiently fundamental to violate the due process clause. The majority opinion's holding in this case, extending the deprivation of survivors' benefits only to all compensation and remedy for the negligent death of the worker clearly implicates a fundamental interest[7] and therefore denies to both the alien worker and his survivors due process.

In Boddie v. Connecticut, 401 U.S. 371 (1971), the United States Supreme Court held that access to divorce courts was sufficiently fundamental so that a state regulatory scheme which barred indigents from the divorce courts denied them due process. See also Williams v. Williams, 328 F. Supp. 1380 (D.V.I. 1971) (denying aliens access to divorce courts violates aliens' due process rights). Certainly, if the interest in dissolving a marriage is sufficiently compelling so that deprivation of access to the courts constitutes a due process violation, the total deprivation to nonresident aliens of any remedy for the negligent death of their father, husband, and breadwinner must be equally compelling. Cf. Thompson v. Bond, 421 F. Supp. 878, 882 (W.D. Mo. 1976) ("We

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[7] Due process rights do not turn upon whether the interest implicated by the deprivation is labeled a "right" or a "privilege." See, e.g., Sugarman v. Dougall, 413 U.S. 634, 644 (1977); Goldberg v. Kelly, 397 U.S. 254, 262 (1970).

agree that a state statute, which in broad and unqualified language, deprives all state inmates of the right to file any type of civil action in state court contravenes the constitutional imperative that citizens are entitled to reasonable access to the courts.").

The due process clause of the fourteenth amendment requires that no person may be deprived of "life, liberty, or property, without due process of law." The majority opinion's construction of the "exclusive remedy" provision of the workers' compensation statute sanctions the deprivation of the worker's life and the deprivation of his survivors' property interests without due process of law.

Equal Protection. It is well established that a state regulatory scheme which discriminates invidiously on the basis of alienage violates the equal protection clause of the fourteenth amendment. See, e.g., Plyler v. Doe, 102 S. Ct. 2382 (1982); Graham v. Richardson, 403 U.S. 365 (1971). In Pedrazza, the Court recognized the bar to survivors' benefits pursuant to section 52-1-52 as "hostile" discriminatory legislation based on alienage, but held that there was no equal protection violation because the Pedrazza plaintiffs were not residents of the United States and their interests in the survivors' benefits were independent of, and not derivative of, the deceased worker who was a resident of the United States. The Pedrazza court clearly indicated that had the plaintiffs claimed interests derivative of the resident worker, an equal protection claim would have been established.

The missing element in Pedrazza—an interest in the nonresident alien survivors derivative of the interests of the resident worker—is supplied by the majority opinion's decision in the present case. The majority opinion holds that not only are survivors' benefits to the nonresident alien

survivors barred, but also their wrongful death action is barred. Plaintiffs' interests under New Mexico's wrongful death statute are derivative of and not independent of the interests of the decedent. New Mexico's wrongful death statute is a "survival-type" statute. See, e.g., Natseway v. Jojola, 56 N.M. 793, 800, 251 P.2d 274, 278 (1952). Under "survival-type" statutes like New Mexico's, it is the decedent's own cause of action which is preserved and this type of statute does not create an independent cause of action in the survivors for their injuries. See W. Prosser, The Law of Torts § 902 (4th ed. 1971) ("[S]urvival acts ... proceed upon the theory of preserving the cause of action vested in the decedent at the moment of his death ...."). Therefore, the majority opinion's construction of the "exclusive remedy" provision of the compensation act implicates not only independent interests of the nonresident alien survivors but also implicates interests of the resident alien worker, who clearly can claim the benefits of the equal protection clause.

The effect of the majority opinion in this case is to create two regimes of law concerned with compensation of workers who die in work-related accidents. In some instances, the law provides a remedy for that death and compensation. In other instances, there is no remedy and no compensation. The distinction is based on alienage. The effect of the majority opinion's construction of the compensation act, through sections 52-1-9 and 52-1-52, is to discriminate against aliens by denying to them any remedy or compensation for the negligent death of the decedent.

The United States Supreme Court's recent decision in Plyler v. Doe, 102 S. Ct. 2382 (1982), clearly establishes that the discriminatory treatment accorded aliens under the majority opinion's construction of the workers' compensation

act violates the equal protection clause. In Plyler, the Court held that Texas' refusal to provide public school education to children of illegal aliens could not be justified under the equal protection clause. The Court held that while alienage may not be a "suspect classification" requiring the strictest scrutiny, classification based on alienage requires some special solicitude requiring justification by "some substantial goal of the State." 102 S. Ct. at 2398. In short, the state must come forward and advance some "substantial goal" to justify the discrimination effected.

There are no "substantial goals" of the State of New Mexico which can justify the discrimination effected under the majority opinion's construction of the workers' compensation act to deprive nonresident aliens of any remedy or compensation whatsoever for the negligent death of their husband, father, and breadwinner. Certainly an interest in preserving the financial resources of the employer is constitutionally unavailing. In Plyler, the Court rejected Texas' proffered justification that protecting the public fisc warranted the discrimination. 102 S. Ct. at 2400. Moreover, any justification based on a state's interest in discouraging illegal immigration was also rejected in Plyler, 102 S. Ct. at 2398-2400, and would be similarly unacceptable in this case. Plaintiffs can imagine no legitimate goal of the state which could justify the harsh, hostile, and discriminatory treatment of aliens created by depriving them of all remedy and compensation for the negligent death of the decedent. Plyler requires the conclusion that the workers' compensation act as construed by the majority opinion violates the equal protection clause of the fourteenth amendment.[8]

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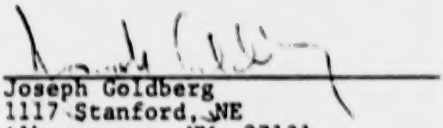
[8] If this Court should determine not to address the constitutional problems raised by the majority opinion in this case, plaintiffs respectfully suggest that this Court should take this opportunity to reexamine the Pedrazza holding that section 52-1-52 does not violate the due pro-

CONCLUSION

For all the above reasons, plaintiffs-respondents respectfully request that this Court withdraw the majority opinion filed on September 30, 1982, and enter a new opinion affirming the decision of the court of appeals.

Respectfully submitted,



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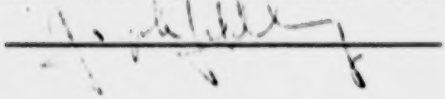

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cess or equal protection clauses of the fourteenth amendment. As discussed in points I and II above, the "linchpin" of the Court's decision in Pedrazza was its conclusion that the only compensation denied to nonresident aliens under the workers' compensation act was survivors' benefits. This conclusion ramified the Court's reasoning as to both the due process and equal protection claims. The elimination by the majority opinion in this case of that essential element to the Pedrazza court's analysis requires reexamination of the holding. Moreover, since the majority opinion holds that plaintiffs are denied their wrongful death claim, plaintiffs have standing to raise the constitutional violations, since there are now interests of the resident worker which are implicated by the discrimination effected through the workers' compensation statute.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

KENT NOWLIN CONSTRUCTION COMPANY,

Defendant-Petitioner,

vs. No. 13,914

ESTELA E. GUTIERREZ and MARIA SOTA VDA DE TALAMANTES, as co-personal representatives of the ESTATE OF BERNARDO TALAMANTES, a/k/a HECTOR M. BAYLON, Deceased,

Plaintiffs-Respondents.

PETITIONER'S SUPPLEMENTAL BRIEF ON REHEARING

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ARGUMENTS AND AUTHORITIES

INTRODUCTION

The respondents' argument in this rehearing is based upon their erroneous belief that the last paragraph of this Court's opinion in Pedrazza v. Sid Fleming Contractors Inc., 94 N.M. 59, 607 P.2d 597 (1980) is dispositive of the issue as to whether or not the Workmen's Compensation Act provides the exclusive remedy for respondents in this case. It is not. What is dispositive is the clear, unambiguous legislative mandate set forth in § 52-1-9 NMSA 1978:

> The right to the compensation provided for in this act [52-1-1 to 52-1-69 NMSA 1978], in lieu of any other liability whatsoever, to any and all persons whomsoever, for any personal injury accidentally sustained or death resulting therefrom, shall obtain in all cases where the following conditions occur:
>
> A. at the time of the accident, the employer has complied with the provisions thereof regarding insurance;
>
> B. at the time of the accident, the employee is performing service arising out of and in the course of his employment; and
>
> C. the injury or death is proximately caused by accident arising out of and in the course of his employment and is not intentionally self-inflicted.

Nowhere do the respondents claim that the petitioner/employer had not complied with the provisions of the Workmen's Compensation Act, nor do they claim that at the time of the accident, the deceased workman was performing service arising out of and in the course of his employment. There is also no contention that the injury or death was not proximately caused by an accident arising out of and in the course of the employment. The three conditions of § 52-1-9 were met, and the inescapable conclusion, as a matter of law, must be that there is no right, on the part of any person whomsoever, to bring any

action whatsoever against the employer (the petitioner here) for wrongful death.

The last paragraph of Pedrazza, in which respondents place so much faith, is clearly dictum, as that term has been defined by this Court. The paragraph is not controlling in this case, particularly in light of the clear language of § 52-1-9, and this Court's prior decisions holding that § 52-1-9 means precisely what it says.

POINT I. THE LAST PARAGRAPH OF PEDRAZZA IS CLEARLY DICTUM, AND NOT A CONTROLLING STATEMENT OF LAW.

Respondents devote many pages of their brief to attempting to show that the last paragraph of Pedrazza is not dictum, or, if it is, that it is nevertheless "judicial" dictum rather than "obiter" dictum, and therefore is binding upon this Court in the present case. A review of the appellate pleadings in Pedrazza, however, clearly demonstrates that the final paragraph in that case is dictum, and was not necessary to the resolution of the single issue then before the Court.

In Rocky Mtn. Life Ins. Co. v. Reidy, 69 N.M. 36, 363 P.2d 1031 (1961), this Court held that language in a prior case "was dictum unnecessary to the decision of the issues before the court in that case and, accordingly, not binding as a rule of law." 69 N.M. at 40. More recently, in Portillo v. Shappie, 97 N.M. 59, 636 P.2d 878 (1981) the court considered the question of whether language in previous cases was binding upon it. The court there noted that where an issue was not presented for review, any language regarding the resolution of that issue was unnecessary for the decision, and was therefore dictum, and not controlling in a subsequent case.

What, then, were the issues presented to the Court in Pedrazza? An examination of the opinion in that case, together with the briefs of the parties and amici curiae, makes it clear that there was only one question presented, and that was whether or not § 52-1-52 NMSA 1978 was constitutional. To quote from the appellants' Brief-in-Chief in Pedrazza:

> There is but one issue for consideration. That is, whether 52-1-52 of the New Mexico Statutes, 1978 edition, is constitutional.

Appellant's Brief-in-Chief, Pedrazza v. Sid Fleming Contractor, Inc, et al., No. 12389, pg. 2. The question of exclusivity of the Workmen's Compensation Act, or the availability of other

remedies, was simply not presented to the Supreme Court in Pedrazza, and the language in the Pedrazza opinion dealing with the availability of other remedies is clearly dictum.

This Court has previously held that a discussion of other possibly available remedies contained in an opinion where that question was not raised on the appeal itself is dictum and not binding. State v. District Court of Eighth Judicial District, 79 N.M. 33, 439 P.2d 551 (1968). This Court in State v. District Court was considering the opinion in State ex rel. Truitt v. District Court of Ninth Judicial District, 44 N.M. 16, 96 P.2d 710 (1939) and in connection with the Truitt opinion, it held that:

> However, the lengthy opinion contains various statements that were not necessary for that decision. The case sought reformation and, under the facts there present, constituted an action in personam. Thus any discussion in the opinion of other types of action was dicta and will not be considered as binding upon us.

79 N.M. at 35. The Pedrazza opinion is similar to Truitt--it went beyond the question presented, and discussed whether or not other remedies might be available. That discussion of other remedies was dictum, and is not a controlling statement of the law in this state.

Respondents argue that the question of other remedies was necessary to the resolution of the constitutionality issue respectively § 52-1-52 because it was part of the ratio decidendi of the Pedrazza opinion--in effect, respondents construe Pedrazza as saying that the only reason § 52-1-52 is not unconstitutional is that there are other remedies available. Even a cursory reading of Pedrazza, however, reveals that that is not the case.

In Pedrazza, § 52-1-52 was attacked on two grounds, due process and equal protection. This Court found that the due process clause was not violated because there was no property interest in workmen's compensation benefits vested in those non-resident dependents, and if there are no property rights, then there is no deprivation of property without due process of law. The "due process" part of the opinion had nothing whatsoever to do with the availability of other remedies. It simply held that there was no deprivation of property, and thus there could be no due process violation in dismissing the suit.

The equal protection part of the Pedrazza decision also was not based upon availability of other remedies. It, rather, was based upon the holding of the United States Supreme Court in Johnson v. Eisentrager, 339 U.S. 763, 771, 70 S.Ct. 936, 940, 94 L.Ed. 1255 (1950). Johnson makes the point that the equal protection of the laws extends to those persons within the territorial jurisdiction of the state. The plaintiffs in Pedrazza, like the respondents here, were admittedly not persons within the territorial jurisdiction of this state or the United States, and the equal protection clause therefore is inapplicable.

Far from being the "linchpin" of this Court's opinion in Pedrazza, the language with respect to other remedies was simply dictum, unnecessary to resolution of any issue presented to the Court in Pedrazza. Deleting the last paragraph of Pedrazza would have no effect whatsoever on the ruling on the question before the Court in that case, or on the reasoning underlying the opinion.

The respondents are now, in effect, saying that if § 52-1-52 is constitutional, as was determined in Pedrazza,

then § 52-1-9 must have been found, in Pedrazza, to be unconstitutional. It would have this Court determine that it decided the constitutionality of a statute in one paragraph of an opinion on an appeal in which that question was not even raised. Respondents argue that this must be the case, or else further, more serious constitutional questions are presented by § 52-1-9. That is not in fact the case, as will be demonstrated below, but it is significant to note that the interpretation of Pedrazza urged by respondents would in fact discriminate against all resident dependents of workmen killed in the course and scope of their employment. Respondents' argument, if true, would mean that a non-resident dependent could file a wrongful death action, with the theoretically unlimited potential recovery available in such an action, while the resident dependent is always relegated to his or her statutorily fixed workmen's compensation benefits. In effect, respondents argue that § 52-1-9 should be made non-discriminatory by discriminating against resident dependents. This would be clearly in violation of the New Mexico Constitution. State v. Martinez, 48 N.M. 232, 149 P.2d 124 (1944).

It should also be noted that, even if Pedrazza were controlling, it would not in fact change the results in this case. Workmen's compensation benefits were paid pursuant to § 52-1-46 NMSA 1978. Moreover, these dependents are "covered" by the act, so the last paragraph of Pedrazza would not apply. The Legislature made a specific determination as to who is entitled to workmen's compensation benefits, and who is not, in specifically referring to this situation in § 52-1-52. Non-resident dependents, whether they are citizens of New Mexico or the United States or citizens of another country, are all

treated the same, and their situation is no different from others who might, in a non-workmen's compensation context, have a right to recover damages for wrongful death, but who, in the context of a workmen's compensation action, are barred from recovery. For example, consider a situation in which a workman is killed on the job, and, if not for the bar of § 52-1-9, his employer would be liable in a wrongful death action. Assume further that the workman had no dependents, as defined in § 52-1-17 NMSA 1978, but that he does have a brother and a sister. Under the Wrongful Death Act, § 41-2-1 et seq., NMSA 1978, the brother and sister would be entitled to share in the proceeds of the wrongful death action brought by the personal administrator, in the same way as these respondents seek to share in the proceeds of a wrongful death action. Under the workmen's compensation action, the brother and sister in the hypothetical example would be barred from any recovery against the employer. That result may seem harsh, but such a result has in fact been upheld as a valid exercise of the Legislature's discretion in determining beneficiaries under workmen's compensation acts. See, e.g., Thol v. U.S., 218 F.2d 12 (9th Cir. 1954); Horney v. Meredith Swimming Pool Co., 267 N.C. 521, 148 S.E.2d 554 (1966); Maiuri v. Sinacola Construction Co., 382 Mich. 391, 170 N.W.2d 27 (1969); Gregutis v. Waclark Wire Works, 91 Atl. 98 (N.J. 1914). Cf. Gallegos v. Homestake Mining Co., 97 N.M. 717, 643 P.2d 281 (Ct. App. 1982).

Non-resident dependents form a similar class of persons who would be entitled to recover in a wrongful death action absent the workmen's compensation act, but who are not entitled to recover under the Workmen's Compensation Act, because the Legislature has determined that the purposes of the act are not furthered by permitting such recovery. As noted in

petitioner's Reply Brief in this case, filed in the Court of Appeals, at page 3, "the philosophy underlying any workmen's compensation statute is to keep an injured workman and/or his dependents off the welfare rolls. 1 Larson's Workmen's Compensation Law § 2.20." In Lane v. Levi Strauss & Co., 92 N.M. 504, 590 P.2d 652 (Ct.App. 1979), it was held that ". . . the purpose of the workmen's compensation law is to prevent . . . [an employee] and his dependents from becoming public charges during the period of disability." Non-resident dependents would not become public charges, and therefore the Legislature excluded them from the right to recover benefits under the act. To construe Pedrazza as respondents urge would reverse that legislative determination, and be counter to the legislative purpose.

A secondary purpose of the workmen's compensation laws is noted in Sanchez v. Hill Line, Inc., 123 F.2d 42 (10th Cir. 1954). The court there, applying New Mexico law, noted that the purpose of workmen's compensation laws is to provide not only for employees a remedy which is both expeditious and independent of proof of fault, but also for employers a liability which is limited and determinate. If non-resident dependents are found to have an additional cause of action above and beyond that of resident dependents or any one else who could make a claim for the death of an injured workman, then this purpose of the workmen's compensation laws would be effectively destroyed. There would no longer be a fixed and determinate liability for employers, although the employee would still have his expeditious remedy, independent of proof of fault.

This Court recognized in Dickson v. Mtn. States Mutual Casualty Co., N.M. State Bar Bulletin, Vol. 21, No. 35, pg. 1084 (1982) that the workmen's compensation law is the

product of a balancing of various interests by the Legislature, and it went on to note in that case that:

> General exclusivity of the New Mexico Workmen's Compensation Act has been litigated in this state. The decisions have uniformly held that the employer or insurer's liability is limited to that set forth in the act.

That considered balancing of interests by the Legislature should not be overruled by this Court by holding that certain dependents are in fact entitled to maintain a wrongful death action against the employer, notwithstanding the exclusivity provisions of the Workmen's Compensation Act.

Despite the line of case law in New Mexico holding that the remedies of the Workmen's Compensation Act are exclusive, from Roseberry v. Phillips Petroleum Co., 70 N.M. 19, 369 P.2d 403 (1962) through Dickson, supra, respondents urge that such a strict construction need not be given to § 52-1-9, and point to the case of Ransmeier v. Camp Cody, Inc., 378 A.2d 752 (N.H. 1977) as support for that argument. It is significant to note, however, that even the New Hampshire court recognized in that opinion that its exclusionary clause was extremely narrow, and was in fact different from the law of those states which bar actions by anyone against the employer when the employee suffers a compensible injury. 378 A.2d at 753. New Mexico has a statute of the latter type and its bar against any action whatsoever by any persons whomsoever should be again upheld.

In short, § 52-1-9 is clear, unambiguous, and has been consistently recognized by the courts of this state as meaning exactly what it says--that when the worker receives a compensible injury, meaning that he was injured on the job, in the course and scope of his employment, no person whomsoever may bring any action whatsoever against the employer other than

that provided for in the Workmen's Compensation Act. The language in Pedrazza, to the extent it implies a contrary result, is simply dictum, and not controlling on this point.

POINT II. THE EXCLUSIVITY PROVISIONS OF §§ 52-1-9 and 52-1-52 ARE CONSTITUTIONAL.

The opinion of this Court from which respondents seek a rehearing passes constitutional muster in all respects. It does not violate the supremacy clause of the United States Constitution, nor does it violate any rights to due process of law or equal protection. In large part, it seems that the respondents are attempting to reargue the constitutional questions presented in Pedrazza with respect to § 52-1-52. The opinion in Pedrazza on those points, however, stands on solid constitutional foundations and the addition of § 52-1-9 to the questions presented does not change the result.

A. SECTION 52-1-9 DOES NOT VIOLATE THE SUPREMACY CLAUSE.

Respondents argue that the result in this case conflicts with treaties between the United States and Mexico, and thus violates the supremacy clause of the United States Constitution. An examination of the treaties themselves, together with the case law, shows that that is not the case.

As a starting point, it must be borne in mind that every statute carries with it a presumption of constitutionality. McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975); Alaska Packers Ass'n. v. Industrial Accident Commission, 294 U.S. 532, 55 S.Ct. 518, 79 L.Ed. 1044 (1934). The burden is therefore on respondent to show that § 52-1-9 is in fact unconstitutional. Respondents have failed to carry this burden.

The treaty with Mexico states, as noted by respondents, that citizens of Mexico are to have access to the courts of the United States "on the same terms which are usual and customary with the natives or citizens" of the United States, and that they "shall enjoy, in every respect, the same rights and privileges, either in prosecuting or defending their rights

of person or of property, as the citizens of the country where the cause may be tried." That same Article XIV, however, also states that the "special protection," referred to but not explained by respondents, applies to Mexicans in the United States and United States citizens in Mexico. It does not apply to Mexicans residing in Mexico, or to United States citizens residing in the United States. The key point here is that the respondents in this case are in fact citizens and residents of Mexico, and not of the United States.

Even if that preliminary requirement were met, however, the question still arises as to in what way these respondents are being denied any right available to a citizen of the United States, and the answer is that there is no such deprivation. A United States citizen who is not a resident of the United States would have no right to dependents' benefits under our workmen's compensation statute pursuant to § 52-1-52 and, by virtue of § 52-1-9, no right to any other action against the employer. The statute is not concerned with the residence or citizenship of the worker who is injured, but rather with the residence (not nationality) of the dependent. Whether the worker is a citizen of the United States, or of Mexico, or of any other country is irrelevant insofar as benefits payable to the dependents are concerned. It is the residence of those dependents which is the focus of the statute (§ 52-1-52) and non-residents, regardless of citizenship, are all treated exactly the same. The treaty only provides that citizens of Mexico are entitled to the same rights and benefits as citizens of the United States, but it does not say that they are entitled to any more. Under § 52-1-9, and § 52-1-52, there is no unequal treatment of dependents based upon citizenship. The law applies equally to U.S. citizens or Mexican nationals.

There is, similarly, no conflict between the New Mexico Workmen's Compensation Act and the treaty with respect to non-agricultural workers dated April 29, 1943. That treaty, by its terms, applies to non-agricultural workers who enter this country legally under contract, and the deceased was not in that group.

There is no conflict between the New Mexico statute and any treaty with Mexico, and there is no supremacy clause violation. No resident of the United States has a right to recover damages from the employer other than those set forth in the Workmen's Compensation Act, and neither does a citizen of Mexico. Section 52-1-9 applies equally to all persons of whatever residence or nationality, and there is therefore no violation of any treaty with Mexico.

To the extent respondents wish this Court to overturn the ruling in Pedrazza on supremacy clause grounds, it is significant to note that those few cases which have dealt with this question have uniformly rejected the contention that there is any such constitutional conflict. In Madonna v. Wheeling Steel Corp., 28 F.2d 710 (4th Cir. 1928), cert. den. 279 U.S. 838 (1928), the court dealt with a West Virginia statute similar to New Mexico's in that it denied dependent's benefits to dependents residing outside of the United States. The court found that this did not conflict with the United States treaty with Italy which, like that with Mexico, stated that citizens of Italy shall enjoy the same rights and privileges as are granted to United States citizens. The Fourth Circuit noted that citizens of the United States, who were dependent, but who resided outside the United States, would not be entitled to any compensation, and that is exactly the situation with the New Mexico statute. Accord, see Micaz v. Compensation Commissioner, 123 W.V. 14, 13 S.E.2d 161 (1941); Norella v. Maryland

Casualty Co., 216 Ken. 29, 287 S.W. 18 (1926). Section 52-1-9 applies equally to all nationalities, Mexican, United States, Canadian, or anything else. There is no violation of the treaty with Mexico, and there is no violation of the supremacy clause.

Similarly, there is no violation of the supremacy clause because § 52-1-9 allegedly interferes with the federal government's exclusive power to regulate immigration. Section 52-1-9 makes no distinction between legal or illegal immigrants, or between citizens of one nationality or citizens of another. All employees, and their employers, are treated equally, regardless of nationality. The statute does not, as respondents state on page 19 of their brief, act to discriminate on the basis of alienage of dependents, but rather on the basis of residence, regardless of the nationality of the dependents. The statute is completely neutral insofar as alienage goes, and has no effect on immigration or naturalization.

B. THERE IS NO VIOLATION OF "DUE PROCESS" IN THE APPLICATION OF § 52-1-9.

Respondents mischaracterize the holding in Pedrazza insofar as due process is concerned. Pedrazza did not hold that due process was not violated because the plaintiffs were only deprived of their survivor's benefits under the Workmen's Compensation Act; rather, it held that there was no property right involved, and so therefore there was no deprivation of any property without due process of law. This Court was specific on that point, holding that, "The Legislature conferred no due process property right upon the plaintiff which the district court could have violated by dismissing plaintiff's suit."

There is no "fundamental right" involved in this action. The United States Supreme Court in San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973) articulated a firm rule: fundamental rights are those that "explicitly or implicitly [are] guaranteed by the Constitution." 411 U.S. at 33-34, 93 S.Ct. 1296-1297; Plyler v. Doe, ____ U.S. ____ 102 S.Ct. 2382, 2403 (1982). Regardless of whether the right is thought to be of social or economic importance, it is not a "fundamental right" within the meaning of the Constitution unless it is actually set forth, either explicitly or implicitly, in the Constitution of the United States. The right to receive workmen's compensation benefits is nowhere so established. Neither is the right to bring a wrongful death action, which is, in fact, in a creature of statute, and in derogation of the common law. Cain v. Rowlby, 114 F.2d 519 (10th Cir. 1940), cert. den. 311 U.S. 710 (1940).

The Fourteenth Amendment states that no person may be deprived of "life, liberty or property, without due process of law." The question which respondents do not answer is what property they have been deprived of. The right to receive workmen's compensation benefits is not "property" and these respondents were not denied life or liberty by § 52-1-9.

C. SECTION 52-1-9 PROVIDES "EQUAL PROTECTION OF THE LAW."

The question as to whether the limitation of the particular dependents to whom workmen's compensation benefits can be paid, and whether or not the limitations violate equal protection, was addressed in Gallegos v. Homestake Mining Co., 97 N.M. 717, 643 P.2d 281 (Ct.App. 1982). There, the parents of a deceased workman were found not to be dependents, and therefore not entitled to workmen's compensation benefits.

Although § 52-1-9 was not specifically addressed, the case is analagous to the present one, in that persons who in a wrongful death proceeding would be entitled to recover benefits, were not entitled to recover any compensation because of the limitations contained in the Workmen's Compensation Act. The Court of Appeals, through Judge Donnelly, noted that the classification fixed by the Legislature does not violate the principle of uniformity, or of equal protection of the laws, if it has a reasonable basis, or rational justification. The burden is on the party challenging the statute to show that it is clearly arbitrary and unreasonable, and not just possibly arbitrary, and not just possibly unreasonable. The Court of Appeals held, moreover, that under the doctrine of separation of powers, courts may not inquire into statutory policy and may not substitute their views in the formulation of legislative provisions or classifications for those of the Legislature. The test employed in Gallegos is that set out by Justice McManus in Espanola Housing Authority v. Atencio, 90 N.M. 787, 568 P.2d 1233 (1977). There, it was held that:

> When an equal protection challenge is leveled against a legislative classification, this court considers the guidelines set forth in Davy v. McNeill, 31 N.M. 7, 14, 240 P. 482, 486 (1925): "If the classification is reasonable, it is valid. It is in the first instance a legislative question as to whether or not the classification is reasonable; that is, could it have seemed reasonable to the Legislature even though such basis seems to be unreasonable, or is it arbitrary and unjust?"

As noted above, it has been held that one of the purposes of the Workmen's Compensation Act is to keep surviving dependents off the welfare rolls of this state. Exclusion of benefits to those who are not even residents of this country would seem to be a reasonable means of achieving that end, as does the exclusion of parents or siblings residing here who are not dependents. The classification is reasonable.

That § 52-1-9 does not violate the equal protection clause with respect to these respondents is also made clear by this Court's decision in Pedrazza. There, the Court noted that, in conformity with Johnson v. Eisentrager, 339 U.S. 763, 771, 70 S.Ct. 936, 940, 94 L.Ed. 1255 (1950), the equal protection clause applies only to persons within the territorial jurisdiction of the state. This rule was affirmed most recently by this year's Supreme Court decision in Plyler v. Doe, supra, a case relied upon by respondents. These respondents reside in Mexico--they are not subject to the territorial jurisdiction of New Mexico, and therefore have no claim of a violation of equal protection of the laws of this state. Nor do they have a complaint with respect to equal protection of the laws of the United States, because they are also not within the territorial jurisdiction of the United States of America.

Even if the equal protection clause did apply, these respondents have not yet explained how they are treated any differently than any other person appearing before a court of this state. No person, whether a citizen of the United States, of Mexico, or of anywhere else, has a right to bring any action, except for workmen's compensation, against an employer which stems from an injury to an employee in the course and scope of his employment. To allow non-resident dependents to bring such an action would in fact be a violation of equal protection for all of those dependents who reside in the United States, in violation of the rule set forth in State v. Martinez, 48 N.M. 232, 149 P.2d 124 (1944).

If this Court determines that § 52-1-9 violates the equal protection clause, it cannot logically limit its holding to non-resident dependents, but will also have to take into account those persons, such as the plaintiffs in Gallegos v.

Homestake Mining Co., who also are barred by the statute from receiving benefits as dependents, and who have no other rights of action against the employer because of the bar of § 52-1-9. It would have to substitute its judgment as to the persons to receive benefits under the Workmen's Compensation Act for that of the Legislature, and in so doing substitute its judgment for that of the Legislature as to how to best further the goals to be accomplished by the Workmen's Compensation Act. That it should not do.

Applying § 52-1-9 in this case does lead to a harsh result. These dependents, resident in Mexico, and not in the United States, are barred from any recovery for the death of the deceased workman except for medical expenses and funeral benefits, which were in fact paid. The perceived "harshness", however, does not make the statute unconstitutional. If the result is harsh, the remedy lies with the Legislature, and not with the Courts.

POINT III. IF THIS COURT DETERMINES THAT § 52-1-9 IS NOT APPLICABLE IN THIS SITUATION, IT SHOULD CONSIDER THE OTHER POINTS RAISED ON APPEAL.

Respondents complain that this Court decided this case in seven sentences, and that more consideration should have been given to their other arguments below. Petitioner believes that seven sentences are more than adequate for this Court to take an unambiguous statute, such as § 52-1-9, and apply it to the facts of this case to determine that there was in fact no right to bring an action for wrongful death against the employer. That decision was correct, and should stand. In the event this Court should reverse itself on that point, however, petitioner respectfully requests that the Court consider the other arguments raised by the Petition for Certiorari. If the judgment of the district court is not reversed, the case should be remanded for a new trial. By reason of § 52-1-9, the first trial was unnecessary, and this Court was correct in so holding. In the event the Court finds that § 52-1-9 is subject to exception, petitioner is entitled to a new trial for those reasons set forth in its Petition for Certiorari and the briefs filed in connection with this appeal.

CONCLUSION

This Court's original opinion in this matter is in complete accord with the precedence established by the case law of this state, and with the clear and unambiguous legislative mandates set forth in § 52-1-9. The Motion for Summary Judgment should have been granted at the trial court level, and this Court should adhere to the opinion it has already issued in this proceeding.

Respectfully submitted,

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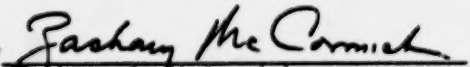
By 

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No. 82-6614

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ASTRID GALINDO SARDOZ and MARIA SOTO VDA. DE TALAMANTES as co-personal representatives of the Estate of BERNARDO TALAMANTES, a/k/a HECTOR M. BAYLON, deceased,

Appellants,

vs.

KENT NOWLIN CONSTRUCTION COMPANY,

Appellee.

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of June, 1983, a copy of the foregoing Appellants' Brief in Opposition to the Motion to Dismiss or Affirm was mailed with first class postage prepaid to Peter J. Adang, Counsel of Record for Defendant, at Modrall, Sperling, Roehl, Harris & Sisk, PO Box 2168, Albuquerque, NM 87103 and to the Attorney General of the State of New Mexico, Paul Bardacke, PO Drawer 1508, Batann Memorial Building, Santa Fe, NM 87503.

Respectfully submitted,

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